Supreme Court, U. S.
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No. 74-1553

In the

Supreme Court of the United States

OCTOBER TERM, 1974

DR. W. D. WILKEY.

Appellant,

vs.

THE ILLINOIS RACING BOARD, ANTHONY SCARIANO, Chairman,

HERBERT CHANNICK, RAY FREEARK, LUCY REUM, PATRICIA HEWITT, SIDNEY HYMAN,

Appellees,

and

THE ILLINOIS STATE RACING STEWARDS, TED ATKINSON, Chief Steward, HENRY HAUER, Steward, PETE BATTLE, Steward,

Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

MOTION TO AFFIRM DECISION OF A THREE JUDGE FEDERAL PANEL

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The decision below was a straightforward application of existing case law and thus does not present a substantial question which would require further argument.

Since the "Question Presented" and the "Statement" in Appellant's Jurisdictional Statement are misleadingly presented, we will restate the question, the facts, and the issues, in order to put this case in its proper context.

Question Presented

Is an administrative rule, which gives a state racing board power to search its licensees without a warrant, permissible under the Fourth and Fourteenth Amendments of the United States Constitution?

Statement of Facts

In April of 1974, the Appellant, Walter D. Wilkey, D.V.M., applied to Appellees, Illinois Racing Board (hereinafter sometimes referred to as the "Board") for a license which would permit him to practice his profession on race tracks regulated by the Board. Appellant has a license from the State of Illinois to practice veterinary medicine and that license is *not* at issue in this case. What is at issue is Appellant's license to practice veterinary medicine at race tracks where pari-mutuel wagering is conducted.

The rule of the Board which is at issue in this case, namely Thoroughbred Rule No. 322, states:

Inspections and Searches

a) The Illinois Racing Board or the State Steward investigating for violations of law or the rules and regulations of the Board, shall have the power to permit persons authorized by either of them to search the person, or enter and search the stables, rooms, vehicles, or other places within the track enclosure at which a meeting is held, or other tracks or places where horses eligible to race at said race meeting are

kept, of all persons licensed by the Board, and of all employees and agents of any race track operator licensed by said Board; and of all vendors who are permited by said race track operator to sell and distribute their wares and merchandise within the race track enclosure, in order to inspect and examine the personal effects or property on such persons or kept in such stables, rooms, vehicles, or other places as aforesaid. Each of such licensees, in accepting a license, does thereby irrevocably consent to such search as aforsaid and waive and release all claims or possible actions for damages that he may have by virtue of any action taken under this rule. Each employee of a licensed operator, in accepting his employment and each vendor who is permited to sell and distribute his merchandise within the race track enclosure, does thereby irrevocably consent to such search as aforesaid and waive and release all claims or possible actions for damages they may have by virtue of any action taken under this rule. Any person who refuses to be searched pursuant to this rule shall have his license revoked.

b) The Illinois Racing Board delegates the authority to conduct inspections and searches, under this rule, to the Chief Investigator of the Illinois Racing Board and to Special Agents of the Illinois Bureau of Investigation, or other designees of the Department of Law Enforcement assigned, from time to time, to assist the Chief Investigator in his duties.

This rule is set forth in its entirety on the license application as is Plaintiff's written consent to be bound by that rule. Plaintiff's application was approved and the license granted on or about April 12, 1974.

On November 22, 1974, three Special Agents of the Illinois Bureau of Investigations, assigned to the Racing Board, attempted to search Dr. Wilkey on the "back-

stretch"* at Sportsman's Park Race Track, in Cicero, Illinois. This occurred at 3:30 p.m. while races were in progress.

Dr. Wilkey permitted the IBI agents to search his automobile, but refused to submit to a search of his person. Dr. Wilkey was then advised that the agents were only interested in any medication that he might have in his pockets. Dr. Wilkey again refused to permit a search.

The agents then accompanied Dr. Wilkey to the stewards'** office. Dr. Wilkey was again asked if he would empty his pockets of medication. He was advised of his rights and of the consequences of his refusal, pursuant to Rule No. 322. Appellant again refused to permit the search. No search of Appellant occurred. The stewards' then suspended him.

The suspension powers of stewards are limited by Illinois Racing Board, Rules and Regulations of Horse Racing (Thoroughbred) Rule 25 which states:

> "The stewards may suspend for no greater period than the duration of the meeting plus 30 days, anyone whom they have authority to supervise. . . ."

Since the day of the attempted search and of the stewards' hearing was November 22, 1974, and since that day was the last day of the thoroughbred racing season

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*The "backstretch" is the area where the racing horses are stabled. Admission to the backstretch is strictly controlled and the only persons entitled to enter this area are employees of the Illinois Racing Board, employees of the race track operator, law enforcement officials, and other persons licensed by the Illinois Racing Board.

**The Thoroughbred Racing Stewards, also Appellees in this case, are the umpires or referees of horse racing.

in Illinois, the suspension would have terminated automatically on December 22, 1974.

However, on November 25, 1974, Plaintiff, by his attorney, filed an appeal with the Illinois Racing Board. The letter requesting the appeal stated, in part:

> "Dr. Wilkey has informed me he will be out of town between December 1st-6th and December 21st-28th. If it is possible to have a hearing between the 6th and 21st of December it would be greatly appreciated." (Defendants' Amended Answer, Exhibit 2, Jurisdictional Statement pg. 30a).

On December 6, 1974, Appellant filed this lawsuit, naming two sets of defendants, the Board and the stewards. On December 11, 1974, Appellant was notified (Defendants' Amended Answer, Exhibit 3, Jurisdictional Statement, pg. 31a) that a hearing before the Illinois Racing Board would be held on December 13, 1974. Appellant, with the advice of counsel, did not attend the Board hearing. Because Appellant was not present, the Board took no action to either affirm or overrule the stewards' ruling.

On December 19, 1974, the Honorable Judge William Bauer of the U.S. District Court for the Northern District of Illinios issued a temporary restraining order staying the effect of the stewards' decision for 10 days. On December 30, 1974, the temporary restraining order was again extended and Judge Bauer ordered the "temporary restraining order extended until Plaintiff's motion for a preliminary injunction is ruled on."

Appellant's license expired on December 31, 1974. Thus, the Appellees, the Illinois Racing Board and its members have never revoked Appellant's racing license and

Appellees, the Thoroughbred Racing Stewards, never had the power to revoke his license.

On March 12, 1975 oral argument was had before a three-judge federal panel consisting of the Honorable Luther M. Swygert, Judge, United States Court of Appeals, Seventh Circuit; the Honorable Richard B. Austin and the Honorable Alfred Y. Kirkland,* Judges, United States District Court, Northern District of Illinois, Eastern Division. Discussion was limited to the constitutionality of Rule 322. The panel found that the rule was constitutional in the light of recent Supreme Court decisions in the area of administrative searches. The motion for a preliminary injunction was denied and the case dismissed.

Discussion in Support of Motion

To review the history of warrantless administrative searches, we must begin with *Frank* v. *Maryland,* 359 U.S. 360 (1959). In that case, this Court upheld a warrantless search provision of a municipal housing code and found the ordinance reasonable because the social purposes served by the search outweighed the costs of the minor intrusion into an individual's privacy.

Camara v. *Municipal Court,* 387 U.S. 523 (1967) overruled the result in *Frank* because of a reappraisal of the balance of values in the context of housing code inspections. However, *Camara* clearly indicated that the ultimate standard of the Fourth Amendment was reasonableness. *Id.* at 539. The Court noted that it would decide the

*This case was originally assigned to Judge William Bauer and was transferred to Judge Kirkland when Judge Bauer was appointed to the Seventh Circuit Court of Appeals.

question of administrative searches on a case by case basis, implying that the balance of state and personal interests would have to be weighed in each instance.

> "In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, *which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.*" (Emphasis added). Id. at 533.

Camara dealt with the search of a private home. *See* v. *City of Seattle,* 387 U.S. 541 (1967) extended the holding in *Camara* to the search of a private business office by fire inspectors.

In the context of municipal code inspections, evidence of violations is not readily concealable or destructible. No legitimate governmental purposes would be frustrated by the requirement of obtaining a warrant. In *Camara,* this Court recognized that a warrant serves two functions: it is a safeguard against pretextual invasions of the privacy of the home; and it serves to inform the individual of the authority of the inspector. *Camara* at 532-3.

In the two subsequent cases, *Colonnade Catering Corp.* v. *U.S.,* 397 U.S. 72 (1970) and *United States* v. *Biswell,* 406 U.S. 311 (1972), this Court dealt with administrative situations in which the balance of social benefit versus protection of individual privacy was considered and, in both instances the court determined that a warrant was not necessary. *Colonnade* dealt with the statutory authorization for warrantless searches of the business premises

of federally licensed dealers in alcoholic beverages. Federal inspectors, without a warrant, and without the dealer's consent, forceably entered a locked storeroom and seized illegal liquor. Neither the Court's majority nor the dissenters had any difficulty upholding the Congress' authority to provide for warrantless searches in this context. The majority construed the penalty provision to be the exclusive remedy, under the statute, for failure to submit to a warrantless search, while the dissenters interpreted the penalty provision as a remedy supplemental to that of forcible entry.

The *Colonnade* opinion justified the absence of a warrant in the liquor regulation context while distinguishing it from the situations present in *Camara* and *See. Colonnade* at 75. This Court noted that the government has been given broad powers to regulate the liquor industry and to protect the revenue derived thereby from various types of fraud. The history of strict regulation of the liquor industry is such that those who enter it cannot reasonably expect the type of deference to their privacy within their business establishments which is due the citizen within the private confines of his home or the businessman within the privacy of his personal office.

Biswell extended the reasoning of *Colonnade* to federal gun control legislation and searches of the premises of weapons dealers. This Court noted that strict regulatory control of the gun industry, like the liquor industry, is in the public interest. A gun dealer is required to maintain records of his sales and is chargeable with knowledge of applicable regulations. When the dealer chooses to engage in the heavily regulated gun industry he has little justifiable expectations of privacy. Unlike the home dweller in *Camara,* the gun dealer is not left to wonder about the authorization or purposes of the search. Unlike building code violations, evidence of violations of the gun regulations are readily destructible or concealable. Proper enforcement of the gun control legislation requires the utmost flexibility in time, scope and frequency of inspection, all of which would be frustrated by ordinary warrant procedures.

Appellees freely concede that appellant is correct in his observation that the horse racing industry is not the liquor industry, nor is horse racing the same as gun dealing. However, the proper question is whether the reasons which make warrantless searches a proper part of the regulation of the liquor and gun industries are also applicable to the horse racing industry.

The criteria of *Colonnade* and *Biswell* can be applied to Rule No. 322 in a straightforward fashion. Parimutuel wagering on horse races is illegal in Illinois, except as authorized by the Horse Racing Act, Ill. Rev. Stat., Ch. 8, Section 37 et.seq. The Board has the broadest kind of administrative power. Ill. Rev. Stat., Ch. 8, Section 37a. As with the liquor industry, the horse racing industry, with its associated activity of gambling, is the type of enterprise which requires strict regulation to prevent corruption, *People* v. *Monroe,* 349 Ill. 270, 280 (1932), and to safeguard the state's interest in revenue. *People ex rel. Scott* v. *Illinois Racing Board,* 54 Ill. 2d 569, 301 N.E. 2d 285 (1973).*

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*It is interesting to note that state courts have often used liquor cases as precedent for racing cases. Some examples are: *Brennan* v. *Illinois Racing Board,* 42 Ill. 2d 352, 247 N.E. 2d 881 (1969); *Desert Turf Club* v. *Board of Supervisors of Riverside County,* 141 Cal. App. 2d 446, 296 P. 2d 882 (1956); *Madden* v. *Queen's County Jockey Club,* 296 N.Y. 249, 72 N.E. 2d 697 (1947); *State Racing Comm.* v. *Latonia Agricultural Assoc.* 136 Ky. 173, 123 S.W. 681 (1909).

Those who enter the business of horse racing receive the same historical notice of close state regulation and control as do liquor and gun dealers. There can be little reasonable expectation of privacy from inspection while on the backstretch of a race track. Indeed the search rule here in question is printed in its entirety on Racing Board license application forms.

In *Colonnade* and *Biswell,* this Court also considered the burden which would be placed on regulatory effectiveness if warrants were required In racing, the need for warrantless searches is perhaps even stronger than in the gun and liquor situations.

The Racing Board is concerned primarily with the regulation of betting and the legitimacy of competition between the horses. The opportunities for violations are many and varied. Evidence of either illegal betting or illegal drugging of the horses is subject to quick removal or destruction. As this Court stated:

> "If inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential." *Biswell* at 316.

This reasoning applies, with equal force, to the regulation of horse racing. Unlike the situations in the liquor and gun industry, evidence of drugging violations can be entirely concealed upon the person of the violator.

At the same time, the administrative contexts considered in *Camara* and *See* contrast sharply with the liquor and gun industries and with horse racing. Evidence of housing and building violations are not readily concealable or destructible. The individual who is subjected to building code searches is unlikely to be aware of

existence and scope of the governments' authority to search absent the presentation of a warrant and he has a time-honored, and justifiable expectation of privacy.

Surely Judge Swygert, in announcing the decision of this case in the court below, was correct in saying:

> ". . .The principle and rationale of Colonnade and the Biswell cases, decided by the Supreme Court of the United States, are controlling; that the fact that one dealt with a liquor dealer's regulation and the other a gun dealer's regulation and this deals with the regulation of horse racing, that that is a difference without any distinction." (Appellant's Jurisdictional Statement at pg. 15a).

Conclusion

For all of the reasons stated above, Appellees submit that this case presents no substantial question of constitutional law. The decision of the lower court should, therefore, be summarily affirmed.

Respectfully submitted,

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Attorney for Appellees